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Oregon Minimum Wage Cases

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OREGON MINIMUM WAGE CASES

THE constitutionality of the statutory minimum wage in private employment, so far as its repugnance to the federal constitution is concerned, is yet an open question. On April 9th, last, the United States Supreme Court, only by reason of an equally divided court, affirmed the judgments of the Oregon state supreme court, in the so-called "Oregon Minimum Wage Cases,"[1] wherein the Oregon minimum wage statute had been held to be not in contravention of the federal constitution.

HISTORY OF THE OREGON CASES

The final judgments by the Oregon court in these cases were rendered, one in the month of March, and the other in the month of April, 1914. Both cases were applications for permanent injunctions against the enforcement of the Oregon statute, based upon the claim that that statute had the effect to deprive plaintiffs of their property without due process of law and to infringe the right of liberty of contract, contrary to the fourteenth amendment. The *Stettler Case* was brought by a manufacturing employer, and the *Simpson Case* by an employee of Stettler. Judgment in the Oregon cases had been entered on demurrer,[2] and

1. Stettler v. O'Hara, et al., and Simpson v. O'Hara, affirmed by equally divided court, U. S. Supreme Court, April 9th, 1917; 37 S. C. R. 475.

2. Stettler v. O'Hara, (1914) 69 Ore. 519, 139 Pac. 173, Ann. Cas. 1916A 217; Simpson v. O'Hara, (1914) 70 Ore. 261, 141 Pac. 158.

practically the only question before the courts was the federal question involved. The cases were immediately taken to the United States Supreme Court on writ of error and advanced for argument at the October, 1914, term of that court. They were fully argued, with extension of time, on the 17th and 18th days of December, 1914; Louis D. Brandeis, of Boston (now Mr. Justice Brandeis), and Attorney-General A. M. Crawford, appearing for the defendants, and Rome G. Brown, of Minneapolis, and C. W. Fulton, of Portland, Oregon, appearing for plaintiffs. No decision was filed upon this argument, and in July, 1916, the cases were ordered by the court to be reargued at the October, 1916, term. That reargument was had on January 18th and 19th, 1917, again with extension of time; Professor Felix Frankfurter, of the Harvard Law School, appearing for the defendants and the same attorneys as in the previous argument appearing for the plaintiffs.

MINIMUM WAGE LEGISLATION IN THE UNITED STATES

These cases were the first minimum wage cases to be taken to the federal Supreme Court. Their importance, especially if a decisive result had been reached, is shown by the present status of minimum wage legislation in the United States.

Such statutes have been passed in the following states: Massachusetts, 1912;[3] Minnesota, 1913;[4] Nebraska, 1913;[5] Arkansas, 1915;[6] California, 1913;[7] Colorado, 1913;[8] Oregon, 1913;[9] Utah, 1913;[10] Washington, 1913;[11] Wisconsin, 1913.[12] In 1915, also, Idaho provided for a commission to investigate the question, but has not as yet passed any minimum wage statute.

With the exception of the statutes of Massachusetts, Nebraska, Arkansas and Utah, these minimum wage statutes are substantially in the terms of the Oregon statute. All these statutes purport to be based upon the police-power regulation of occupa-

3. Mass. Acts 1912 Chap. 706; Mass. Acts 1913 Chaps. 330 and 673.
4. Minn. G. S. 1913 Chap. 547.
5. Neb. Laws 1913 Chap. 211.
6. Ark. Laws 1915 Act 191.
7. Cal. Statutes 1913 Chap. 324.
8. Colo. Laws 1913 Chap. 110.
9. Ore. Laws 1913 Chap. 62.
10. Utah Laws 1913 Chap. 63.
11. Wash. Laws 1913 Chap. 174.
12. Wis. Rev. Stat. 1913 Section 1729s—1 to 12, Laws 1913 Chap. 712.

tions in the interest of "public welfare, safety, health and morals." In each case, their concrete object is to provide for women workers a wage which shall not be less than that which is considered required to supply each female worker, as an independent supporter of herself, such full "living wage" as will keep her in health and comfort. Such exercise of police-power regulation is based on the claim that the supplying, to an individual who happens to be an employee in any occupation, of the needs of such individual for a comfortable living, makes the occupation in question "affected with a public interest," and, therefore, subject to the wage regulation in question.

The Massachusetts statute authorizes a commission to investigate and determine the wages of female workers in any industry or occupation which are necessary to supply to such workers the cost of living and to maintain them in health. The commission has the same power as to the wages of all learners or apprentices, of either sex, and of all minors below eighteen years of age, of either sex. The wage so found is not directly compulsory upon the employer; that is, there is no fine or imprisonment for failure to pay that wage.

The penalty upon an employer for not paying the prescribed wage is, that the commission publishes the recalcitrant employer in newspapers, and the publication of such official list is made compulsory upon the newspapers. The only remedy allowed the employer is, that he may come into court and assume the burden of proof of showing that the prescribed wage is such as not to leave him a fair profit. If he is successful in so showing, then the court may restrain the commission from the publication provided. The remedy is individual to each employer.

This method of coercion was intended to obviate the constitutional objections raised to directly compulsory statutes. In its practical application, it is more repugnant to the business sense of the community, as well as to established law, than the apparently more drastic statutes of Minnesota and Oregon. This can now be better said of the Massachusetts statute than it could be a year or two ago, before its viciousness had been demonstrated by practice. The state commission and its wage boards become mere instruments for carrying out the demands of the employees. In terms, the statute affords employers a hearing upon the question of the reasonableness of the wage fixed and of their ability to pay. In practice, all such considerations are cast aside, includ-

ing evidence of facts, except in so far as they accord with the preconceived notion as to what the wage should be in order to give to the employees all that they demand, and to take from the employers irrespective of their ability to pay. If an employer fails to pay the wage fixed he is published throughout the state. The statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist an employer. He may be compelled thus publicly to hold up to censure his own relative, or his best paying advertiser—or even himself. Such a statute holds over every employer the threat of an official, public blacklist and boycott, more severe and more damaging than any private boycott ever established.

Again, in practice, the Massachusetts statute, as also all minimum wage statutes, results in discrimination. Its wage boards and commission fix different wages for different occupations, and even for different classes of employees in the same occupation. As the wage is fixed irrespective of the earning capacity of the employee and is theoretically based upon the individual cost of living, then why has one worker a right to a living wage greater than that of another? The fact is that, although theoretically computed upon the basis of a living wage, it is not computed at all. It is simply fixed for each class, from time to time, as the various boards are influenced by the demands of the employees. Moreover, each wage, when fixed, is only a stepping-stone to a higher wage. Each class of employees is constantly seeking an increase, regardless of any basis of computation, and particularly regardless of the worth of the employee to the employer.

The results of the application of the Massachusetts statute have justified the objections to such legislation based upon economic as well as upon constitutional grounds. The first industry in the United States to have applied to it the statutory minimum wage was the brush-making industry in Massachusetts, in which, from its very nature, an unusually large number of unskilled workers are employed. One brush concern, after the minimum wage for brush makers took effect, discharged over one hundred of its unskilled employees. Then it reorganized its methods of work so that the less skilled labor is done by those who also perform more skilled work. The total wage, however, is $40,000 a year less than that paid before. Many others of the brush concerns in Massachusetts discharged a large number of

their employees who were incapable of earning the wage fixed. An investigation six months afterwards showed that two-thirds of the workers so discharged had not since been able to get employment in any line of work at any price, and that many were engaged in other employments where a minimum wage was not yet fixed, and were receiving less than when discharged from their work as brush makers.[13] The Massachusetts courts have been holding their decision as to this statute's constitutionality, awaiting the United States Supreme Court's decision in the Oregon cases.

The Minnesota statute prohibits any employer from employing any "worker" at less than a "living wage." "Worker" is defined to mean a "woman . . . employed for wages"; that includes, also, minors (of both sexes), a woman or minor learner, and a woman or minor apprentice. "Living wage" is defined as "wages sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."

In Minnesota a commission was formed and proceeded to put the statute in operation, but was enjoined by the courts in a decision holding the statute unconstitutional.[14] This decision was filed November 23, 1914, and is now in the supreme court of Minnesota, on appeal, having been argued and submitted, but held for decision awaiting decision of the United States Supreme Court in the Oregon cases.

The Arkansas statute fixes the minimum wage in the first instance directly, instead of through a commission. It provides:

"Sec. 7. It shall be unlawful for any employer of labor mentioned in Section 1 of this Act [manufacturing, mechanical or mercantile establishment, laundry, or express or transportation company] to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided: All female workers who have had six months' practicable [practical] experience in any line of industry or labor shall be paid not less than $1.25 per day. The minimum wage for inexperienced female workers who have not had six months' experience in any line of industry or labor shall be paid not less than $1.00 per day."

13. Mass. Minimum Wage Commission. Bulletin and Annual Report; also, "The Minimum Wage—Massachusetts Experience," published, Boston, 1916, Merchants and Manufacturers of Mass.

14. A. M. Ramer Company v. Evans et al., and Williams v. Evans et al., decided in Ramsey County District Court by Judge Catlin, November 23, 1914.

Section 9 provides that females who are paid upon a piece work basis, bonus system or in any other manner than by the day, shall be paid not less than the rate specified for the female employees who are working on the day rate system. A commission is provided which, after investigation, may raise or lower the statutory rate so fixed, and establish a rate which "is adequate to supply a woman, or minor female worker engaged in any occupation, trade, or industry, the necessary cost of proper living, and to maintain the health and welfare of such woman, or minor female worker." Failure on the part of any employer to pay the rate so fixed is punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day of noncompliance. This Arkansas statute has been declared unconstitutional by the lower courts of that state and on appeal the question is still pending in the Arkansas supreme court.[15]

The Nebraska statute substantially follows that of Massachusetts.

The California statute fixes the minimum wage as "the necessary cost of proper living and to maintain the health and welfare of such women and minors." It is generally on the lines of the Oregon statute.

The Colorado statute applies to "any mercantile, manufacturing, laundry, hotel, restaurant, telephone or telegraph business." The minimum wage is fixed on the basis of what is adequate "to supply the necessary cost of living, maintain them in health and supply the necessary comforts of life." This statute is generally on the lines of the Oregon statute.

The Washington statute prohibits employment of women workers "at wages which are not adequate for their maintenance" and authorizes the establishment of a minimum wage such "as shall be held to be reasonable and not detrimental to health and morals and which shall be sufficient for the decent maintenance of women."

The Wisconsin statute prohibits less than "a living wage," to any female or minor employee; which is defined to mean compensation by time or piece work or otherwise "sufficient to enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare."

In Utah, the wage commission feature of other state statutes is entirely eliminated, and the statute briefly and directly makes it

15. Arkansas v. Crowe, submitted 1915.

unlawful to employ females at less than a specified rate for minors, another specified rate for adult learners and apprentices, and another specified rate for experienced adults. There is no distinction between different classes of employments, and a breach of the law by any regular employer is made a misdemeanor.

There are no minimum wage statutes in either Idaho or Ohio. In Idaho, however, the legislature of 1915 provided for a commission to investigate the question of minimum wages. In Ohio, in 1912, there was adopted a constitutional amendment authorizing laws establishing minimum wages.

THREE CLASSES OF STATUTES

From the above summary it will be seen that the statutes of Massachusetts and Nebraska are on a different basis from those of the other states. The statute of these two states has been sometimes termed a "non-compulsory" statute, because it does not, under a direct penalty upon the employer, compel the adoption of the minimum wage fixed by the commission, but compels newspapers to publish the delinquent employer as a recalcitrant. It is obvious that such a statute is indirectly and drastically compulsory, and that, too, by an attempt to legalize a compulsory black-list. This question was not directly involved in the discussion of the Oregon cases, although it is now pending before the Massachusetts courts.

The statutes in the states other than Massachusetts and Nebraska are directly compulsory and penal in their provisions. These others, however, are of two kinds: (1) those in which the statutory wage is fixed by a commission through wage boards, and whose final promulgation of the wage in any employment is binding upon the employer; and (2) those, of which there are two, Arkansas and Utah, in which the terms of the statute fix in precise figures the statutory wage, without providing for the intervention of a commission in the original instance.

UNCONSTITUTIONAL FEATURES

While differing somewhat in detail, the main provisions of the Oregon statute are followed in the statutes of all these other states, except, as already stated, in Massachusetts and Nebraska, and in Arkansas and Utah. The main objections to its constitutionality are: (1) it fixes a wage based solely upon the individual needs of the employee, measured not by anything which has relation to the fact of employment or to the particular occu-

pation in question, but measured solely by the individual needs of the person employed,—not as a worker but as an individual entitled in some way to all the funds necessary to supply her needs in accordance with an arbitrary standard of living; (2) it puts the burden on the employer to supply these individual needs to the extent that the money required therefor is in excess of what the employee earns, or can earn, or is worth; (3) it prohibits the employee from making a binding contract for work at an amount which is measured by efficiency or worth, and renders jobless those whose efficiency does not come up to that properly measured by the minimum wage fixed; (4) the statute has, therefore, the effect to deprive both the employer and the employee of their property and of the liberty of contract.

In the *Stettler* and *Simpson* cases the facts were undisputed that the employee, Simpson, was a regular worker whose efficiency was such that she was unable to earn in the occupation in question, or in any other occupation, more than $6.00 per week, and that she was one of a large number of such employees; and that the statute in question had the effect to compel Stettler, the employer, to pay her not less than $8.64 per week, and also had the effect to prevent her from making any contract for employment at $6.00 per week, or any other sum less than $8.64.

This is a good example of the effect of these minimum wage statutes, although rates at which the minimum wage is fixed vary in different states and vary according to raises which may be made from time to time by the wage commissions.

ARGUMENT FOR UNCONSTITUTIONALITY

The theory on which the Oregon statute was held constitutional by the supreme court of that state and on which theory the main argument for its constitutionality is based, is that it is police-power regulation supportable on the same theory that statutory regulation of maximum hours of employment has been upheld. The fact, which is apparent, that the regulation attempted involves to some extent the deprivation of property and of liberty of contract is admitted; but it is claimed that this statute comes within the well established rule that such deprivation of property or of liberty does not make the statute repugnant to the fourteenth amendment, if such deprivation is one which is only incidental to a proper exercise of the police-power of regulation,—under the rule that the rights of property and of contract

protected by the federal constitution are not absolute and unyielding, but are "subject to limitation and restraint in the interest of the public health, safety, and welfare, and such limitations may be declared in legislation of the state."[16] And numerous instances of regulation of occupations at the expense of the employer are cited as precedents controlling in this instance.

Such argument overlooks the distinctions expressly made by the federal Supreme Court in supporting state legislation regulating occupations or business in different ways.

The declaration by a state legislature that an attempted regulation of a business is enacted in promotion of the public health, safety or welfare, does not render the enactment valid as a police regulation. There is a limit to the valid exercise of the police-power of the state. A public welfare statute must have a direct relation as a means to an end, and the end itself must be appropriate and legitimate.[17]

Regulation of hours in *public employment* does not involve the question of the state's police-power, for such regulation applies only as between the state itself, or political sub-division thereof, and its own employees.[18] So, of course, as to minimum wage statutes which apply only to public employment. As to *private employment* the regulation of hours is supported only because, and to the extent that, longer hours involve dangers to the safety and health of employees, arising out of hazards which are peculiar to the employment in question.[19]

The Factory Acts compel the employer, at his own expense, to protect all employees against hazards of unsafe machinery or of unsanitary conditions of work,—hazards only which are peculiar to the employment in question, and which arise out of the fact and nature of the employment. The Workmen's Compensation Acts protect the employee against casualties arising out of and because of the hazards of and during employment. Such statutes are sustained as a proper exercise of the police power

16. Coppage v. Kansas, (1914) 236 U. S. 1, 28, 35 S. C. R. 240, L. R. A. 1915C 960.

17. Lochner v. New York, (1905) 198 U. S. 45, 56, also dissenting opinion p. 68, 49 L. Ed. 937, 25 S. C. R. 539; Coppage v. Kansas, (1914) 236 U. S. 1, 15-16, 35 S. C. R. 240, L. R. A. 1915C 960.

18. Atkin v. Kansas, (1903) 191 U. S. 207, 218, 48 L. Ed. 148, 24 S. C. R. 124.

19. Holden v. Hardy, (1898) 169 U. S. 366, 395, 42 L. Ed. 780, 18 S. C. R. 383; Muller v. Oregon, (1908) 208 U. S. 412, 421, 52 L. Ed. 551, 28 S. C. R. 324.

because the protection thereby given has "a real, substantial relation" to the employment itself. The state regulation of rates of public service companies, of railroads, and of insurance companies, is supported solely on the basis that these enterprises are quasi-public, or so affected with a public interest, that the regulation made is valid.[20]

But the need to any person of a "living" is an *individual* need. It exists before employment, and during employment, and after employment. Such need is, indeed, diminished, or supplied, during employment to the extent of the wage actually paid. Hazards and dangers that arise from this individual need are less with employment than they are without employment. The need itself is one which is a natural or purely individual need and has no origin in the fact of employment.

The statutory "living wage" is based upon the ethical doctrine that every person born into the world has a "generic right" to receive from the state, or the community in which he lives, the full means of subsistence; and more than a mere subsistence only, —he has such a right to the full means of living in health and comfort, including reasonable expenditures for pleasure and diversion. What an individual does not earn, so far as necessary to supply the living wage, must come from outside sources. The minimum wage statute says that this difference must be supplied by the one who happens to have that individual on his pay-roll; and that such employer cannot make a valid contract for employment for any less than such fixed minimum. He must contribute the balance, even if he has to pay it out of profits. If he cannot pay it out of profits then he must pay it out of capital. If his business is such that it cannot continue under such expenditures, beyond those which his business will allow, or which competition from other states will permit, then his business must cease. His business has become a "parasite" in the industrial world because it cannot finance the normal cost of its existence together with the forced contribution to the individual needs of its employees which are measured by the minimum wage.

An Arizona statute limiting the number of aliens that an employer could employ, and similar statutes, have been held unconstitutional by the federal Supreme Court on the ground

20. Munn v. Illinois, (1876) 94 U. S. 113, 24 L. Ed. 77; German Alliance Ins. Co. v. Lewis, (1913) 233 U. S. 389, 415, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

that, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure."[21]

As to a labor union statute the same court had said:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it . . . The employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[22]

A Kansas statute attempted to prevent the condition in contracts for labor that an employee should remain a non-union man; but was held unconstitutional and the federal Supreme Court adhered to the rule laid down in the *Adair Case,* saying:

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."[23]

Further support of the minimum wage statutes is attempted on the ground that they apply only to women employees and are a proper police-power regulation, because women are of "weak bargaining-power," and that, therefore, intervention of the state, in respect of contracts between them and their employers, is justifiable. This argument is also completely answered in the *Coppage Case,* where the same argument was made with reference to employees generally in regard to contracts of employment. The court said:

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21. Truax v. Raich, (1915) 239 U. S. 33, 41, 60 L. Ed. 131, 36 S. C. R. 7, L. R. A. 1916D 545.

22. Adair v. United States, (1908) 208 U. S. 161, 174, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764.

23. Coppage v. Kansas, (1914) 236 U. S. 1, 14, 35 S. C. R. 240, L. R. A. 1915C 960.

"No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.

"And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."[24]

The dissenting opinion in the *German Alliance Insurance Co. Case* denied the right to regulate insurance rates, on the ground solely that the business was not one properly termed "affected with a public interest,"—that is, it denied the fact which was the basis of the decision of the majority of the court upholding the state regulation of insurance rates. This dissenting opinion, therefore, without conflicting with any legal principle held by the majority, discussed the question of the regulation of prices, rates, wages, etc., in private businesses. On that point of law, therefore, it is a direct authority. Quoting from that opinion:

"If the price of a private and personal contract of indemnity can be regulated—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of

24. Coppage v. Kansas, (1914) 236 U. S. 1, 17-20, 35 S. C. R. 240, L. R. A. 1915C 960.

the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute. . . .

"Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act, they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employee to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individuals. . . .

"For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employee in order to support himself and family."[25]

On principle and also on authority, the minimum wage statute seems clearly to extend the power of regulation beyond the limits held to be prohibited by the federal constitution.

ECONOMIC OBJECTIONS

There are many economic objections to the minimum wage statute. These are not directly pertinent in a discussion of its constitutionality; but they should not be overlooked. Competition today is not confined to intra-state trade. Prices are determined by the markets of the entire country, indeed, of the world. In the case of most manufacturing enterprises the largest percentage of their trade is outside of the limits of the home state. Any local, artificial raising of the cost of production interferes with natural competition. Industries of states not interfering with wages have an advantage over those of states exercising such paternalistic interference.

25. German Alliance Ins. Co. v. Lewis, (1913) 233 U. S. 389, 420-424, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

Again, the minimum wage statute defies the economic law of supply and demand and increases the army of jobless seekers of work. The employer will not keep employees on his payroll whose efficiency is below the standard of the minimum wage. The employee is forbidden to make a contract for what his labor is worth. He must achieve a certain standard of efficiency, —and this, too, at his own expense,—before he can get a job. He is deprived of the assistance which he might otherwise obtain by getting a job for what he is worth, and having his wage increased as his efficiency increases. If the employer, by reason of the extra production-cost imposed, has to go out of business, then all classes of his employees are rendered jobless.

As an economic proposition the minimum wage is impracticable and it tends to fix a maximum wage,—which is presumably impossible by legislation. The tendency of the effect of the minimum wage is to lower higher wages and to establish maximum wages as well. The possible wage-cost of any particular industry is limited. If a sum which is more than the work-worth of the less efficient employees is fixed as a minimum wage for them, then the unavoidable result is holding the more efficient class more precisely to the limit of their actual work-worth; and thereby the rewards for experience and efficiency, by participation in profits beyond the actual wage, are diminished. Mr. Samuel Gompers, president of the American Federation of Labor, has expressed his view that the statutory minimum wage is a step toward slavery. President Wilson, and others, recognize the fact that the ultimate tendency of the minimum wage is to lower higher wages rather than raise lower wages.

The claim was formerly asserted that the statutory minimum wage is a protection of the morals of women workers. This sensational claim has been practically abandoned. Of course, if insufficient wages during employment produce immorality, then lack of employment would tend to produce it all the more. As said by Judge Catlin of the District Court of Ramsey County, Minnesota, in the *Ramer* decision, already cited, such a statute "is quite as likely in actual results to increase both distress and immorality, if morals are dependent on wages."

SOME SURMISES SUGGESTED

An interesting phase of the consideration of this question by the United States Supreme Court is the question of the probable effect upon the final result caused by the changing personnel of

the court during the consideration of these cases. Whatever may be the basis of such surmise, and without any available proof to support it, it seems probable that after these cases were first submitted the court after consultation reached a decision reversing the Oregon state courts and holding that the Oregon statute was unconstitutional; that that decision was being written by Justice Lamar at the time of his sickness and death; and that such decision had been reached with five justices for reversal and four dissenting. Further, it would seem that the death of Justice Lamar left the court evenly divided, and that it was therefore decided to await the appointment of Justice Lamar's successor, whose opinion in the matter was expected to be decisive upon reargument. It happened, however, that after a long delay Justice Brandeis was appointed, but was disqualified to sit in these cases, having been of counsel in their former presentation. Then came the resignation of Justice Hughes, and this apparently left the seven remaining members of the court, who were qualified to sit in these cases, four to three in favor of the unconstitutionality of this statute. Then reargument was ordered and the appointment of Justice Clarke followed. No members of the court having changed their mind upon reargument, this left the court four to four. The final decision does not state which four favored and which opposed the constitutionality of the statute, but the writer's surmise is, that on the first submission the statute was deemed unconstitutional by Chief Justice White and by Justices Van Devanter, Lamar, Pitney and McReynolds, and was deemed constitutional by Justices McKenna, Holmes, Day and Hughes It seems evident that in the final decision Justices McKenna, Holmes, Day and Clarke favored affirmance, with Chief Justice White, and Justices Van Devanter, Pitney and McReynolds for reversal.

EFFECT OF DECISION BY DIVIDED COURT

The judgment of affirmance rendered in these cases is by some assumed to constitute an authority and precedent holding that the statutory minimum wage is not repugnant to the prohibitions of the federal constitution. Such is not the case. The question of constitutionality is still an open one, so far as the federal courts are concerned, and also so far as all state courts are concerned, except, of course, in Oregon where it has been upheld by the state supreme court. The rule in the United States is that, a decision by a divided appellate court operates to affirm the decision

reviewed, and determines the rights of the parties in the particular case, but does not establish a rule of law which has the force of precedent either in the same court or in inferior courts.[26] In such case no opinion is handed down and the decision is simply one of "affirmance by a divided court," without settling the principles of law which were at issue before the court.[27]

It may be expected, therefore, that the Minnesota state supreme court will disagree with the Oregon supreme court and uphold the decision of Judge Catlin in the *Ramer Case;* and also that the decision of the lower courts of Arkansas against the constitutionality of the minimum wage statute of that state will be upheld.

This sort of legislation is a new expression of the paternalistic and socialistic tendencies of the day. It savors of the division of property between those who have and those who have not, and the leveling of fortunes by division under governmental supervision. It is consistent with the orthodox socialist creed, but it is not consistent with the principles of our government which are based upon the protection of individual rights. After long study and discussion of the subject, such legislation still seems to the writer to be a long step toward nullifying our constitutional guaranties.

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26. Hertz v. Woodman, (1910) 218 U. S. 205, 213-214, 54 L. Ed. 1001, 30 S. C. R. 621.

27. Etting v. Bank of United States, (1826) 11 Wheat. (U. S.) 59, 78, 6 L. Ed. 59; Durant v. Essex Co., (1868) 7 Wall. (U. S.) 107, 113, 19 L. Ed. 154; Kinney v. Conant, (1909) 92 C. C. A. 410, 166 Fed. 720, 721; Westhus v. Union Trust Co., (1909) 94 C. C. A. 95, 168 Fed. 617, 618.